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PD-1289-17
In the Court of Criminal Appeals of Texas
At Austin

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No. 01-15-00717-CR
In the Court of Appeals
For the First District of Texas
At Houston

———♦———

No. 1452040
In the 248th District Court
Of Harris County, Texas

———♦———

Dedric D'shawn Jones
Appellant

v.

The State of Texas
Appellee

———♦———

State's Brief on Discretionary Review

———♦———

Clint Morgan
Assistant District Attorney
Harris County, Texas
State Bar No. 24071454
morgan_clinton@dao.hctx.net

1201 Franklin St., Suite 600
Houston, Texas 77002
Telephone: 713 496 2194

Kim Ogg
District Attorney
Harris County, Texas

Ashley Mayes Guice
Assistant District Attorney
Harris County, Texas

Identification of the Parties

Counsel for the State:

Kim Ogg, District Attorney of Harris County; **Ashley Mayes Guice**, Assistant District Attorney at trial; **Clint Morgan**, Assistant District Attorney on petition for discretionary review.

1310 Prairie, Suite 500
Houston, Texas 77002

Jessica Akins, Former Assistant District Attorney of Harris County, counsel on direct appeal.

1000 Louisiana St Ste 2300
Houston, Texas 77002

Appellant:

Dedric D'shawn Jones

Counsel for the Appellant:

Charles Brown, trial counsel

708 Main St., Suite 790
Houston, Texas 77002

Adam Banks Brown, counsel on direct appeal

300 Main St., Suite 400
Houston, Texas 77002

Trial Court:

Katherine Cabaniss, presiding judge

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Statement of the Case

The appellant was indicted for assault of a person with whom he had a dating relationship. (CR 6). The indictment alleged a prior misdemeanor conviction for assault of a family member, as well as two felony convictions, with one for an offense committed after the other felony conviction became final. (CR 6). The appellant pleaded not guilty, but a jury found him guilty as charged. (CR 93). The appellant pleaded "true" to the felony enhancement paragraphs, and the trial court assessed punishment at twenty-five years' confinement. (CR 95). The trial court certified the appellant's right of appeal, and the appellant filed a timely notice of appeal. (CR 94, 99).

A divided panel of the First Court reversed the judgment of guilt and remanded the case to the trial court. *Jones v. State*, 540 S.W.3d 16 (Tex. App.—Houston [14th Dist.] 2017, pet. granted). The State filed a motion for rehearing, which the First Court denied. This Court granted discretionary review on April 25, 2018.

Grounds for Review

1. The First Court erred in holding the trial court abused its discretion in excluding impeachment evidence. As the dissenting justice pointed out, the appellant's offer of proof failed to establish a causal or logical relationship between the excluded evidence and the witness's alleged bias. The First Court's opinion provides precedent for appellate courts to reverse trial courts based on speculation of what cross-examination *might* have revealed, rather than what the offer of proof showed it would reveal.

2. The First Court erred by failing to consider the weakness of the defensive evidence in conducting its harm analysis. The First Court looked only at the State's evidence, and ignored the fact that the appellant failed to produce evidence that would support a jury's finding that he acted in self-defense.

Statement of Facts

The evidence of the appellant's offense came from two witnesses, Adeline Gonzales and the appellant. Gonzales was living with Amy Jimenez (her daughter), Alice [1] (Jimenez's young daughter), and the appellant (Jimenez's boyfriend and Alice's father). (4 RR 37-38). According to Gonzales, the four of them were watching a movie one night when the appellant began making inappropriate comments. (4 RR 40). Gonzales took Alice to a different room. (4 RR 40-41). The appellant went to the garage. (4 RR 42).

[1] The State will use the pseudonym "Alice" to refer to the young child. *See* TEX. R. APP. P. 9.10 (prohibiting use in court documents of name of anyone who was a minor at the time of the offense).

Sometime later Gonzales came out and told Jimenez that Alice needed school supplies. (4 RR 41). Jimenez went to the garage, where she had an argument with the appellant about going to the store. (4 RR 42-43). Gonzales opened the garage door and saw the argument. (4 RR 43). Gonzales saw Jimenez "whack" the phone the appellant was holding to get his attention. (4 RR 43-44). The appellant then struck Jimenez on the face, causing her lip to bleed. (4 RR 43-44).

The appellant testified to a similar version of events. In the appellant's story, after Jimenez called him out for making inappropriate comments during the movie, the appellant went to the garage and played games on his phone for an hour and a half. (4 RR 144). Jimenez came out to ask the appellant to check whether a freshly-painted part of the house had dried yet. (4 RR 143-44). The appellant believed Jimenez was trying to argue with him, so he ignored her. (4 RR 145-46). Jimenez then "karate kick[ed] the phone out of [his] hand." (4 RR 146). The appellant responded by slapping her. (4 RR 146).

First Ground for Review

The First Court erred in holding the trial court abused its discretion in excluding impeachment evidence. As the dissenting justice pointed out, the appellant's offer of proof failed to establish a causal or logical relationship between the excluded evidence and the witness's alleged bias. The First Court's opinion provides precedent for appellate courts to reverse trial courts based on speculation of what cross-examination *might* have revealed, rather than what the offer of proof showed it would reveal.

The First Court reversed the trial court's judgment based on a perceived violation of the appellant's constitutional right to confront witnesses. Specifically, the trial court prohibited the appellant from asking Gonzales whether she would get custody of Alice if the appellant's parental rights were terminated.

I. Background

A. At trial, the defense sought to impeach Gonzales with the fact that she wanted to obtain custody of Alice, but when given an opportunity to create an offer of proof failed to elicit evidence that Gonzales wanted to obtain custody of Alice.

Immediately prior to trial, defense counsel said that he wanted to cross-examine Gonzales about a Child Protective Services investigation and whether Gonzales had any connection to it:

> [Defense counsel]: … [I]t is my understanding that CPS is involved and the welfare of the children in whether or not parental rights were taken from [Jimenez], and [the appellant],

> and that one of the persons who may be — I don't know how to put this gently — would get the grandchild would be the mother. Again, it would go to motive as to why — if she sat up there and saw, based on the police report, if she saw mutual combat —
>
> The Court: So you want to ask [Gonzales] whether there's a CPS investigation and whether she gets the children if that CPS issue was sustained?"
>
> [Defense counsel]: Yes.

(4 RR 12). The trial court said that it did not believe the investigation and "any potential outcomes" would be relevant, "and in fact would be more prejudice to the defendant." (4 RR 13).

After Gonzales testified, the trial court allowed defense counsel to make an offer of proof regarding excluded evidence. (4 RR 89). Most of the questions revolved around other excluded evidence regarding whether Gonzales believed Jimenez was violent — hence defense counsel's preface that he was "asking these questions under [Rules of Evidence] 701 and 405." (4 RR 89). At the end of the proffer came the exchange about the CPS hearing at the heart of the First Court's reversal:

> Q; Do you know that there's a CPS — that there's a child custody battle going on to eliminate parental rights of both [Jimenez] and [the appellant]?
>
> A: Yes, sir.
>
> Q. Do you have an interest in that being done?

A. I don't understand what that means.

Q. Do you have a preference?

A. Do I have preference of what?

Q. That their parental rights be terminated or not?

A. I don't have any say in that. That damage has been done between the both of them.

Q. My understanding is the child is with an aunt; is that correct?

A. My sister.

Q. Your sister?

A. Yes. And before that she was with me. I've had her. I've always had her.

Q. The reason that you take care of the child is because of the relationship that [the appellant] and [Jimenez] have, correct?

A. I'm sorry?

Q. It's because of the type of relationship that [Jimenez] and [the appellant] have and the things that they do destructive toward each other, correct?

A. I'm not sure I want to answer that.

Q. The reason —

A. Yes, that's why I take care of her because I want her to be safe. She's a beautiful little girl. She deserves to be safe. (Witness crying).

(4 RR 93-94). After the offer of proof, defense counsel made no additional requests of the court regarding the admission of evidence, and the court made no ruling. (*See* 4 RR 94).

B. On direct appeal, the appellant claimed that the trial court erred in limiting his cross-examination of Gonzales, and a split panel of the First Court agreed.

On appeal to the First Court, the appellant claimed that the trial court reversibly erred by refusing to let him cross-examine Gonzales about her "desire to obtain custody of her grandchild." (Appellant's Brief at 14). A two-justice majority of the First Court panel, after discussing several sections of the Family Code regarding custody hearings, described this case as "a classic Confrontation Clause case" and claimed that it was "hard to imagine a more clear-cut case in which a criminal defendant should have been permitted to confront the sole eyewitness against him…." *Jones v. State*, 540 S.W.3d 16, 31 (Tex. App.—Houston [14th Dist.] 2017, pet. granted).

A dissenting justice did not seem to share the majority's lack of imagination. Justice Brown pointed out that the appellant had not established "Gonzales actually wanted or took steps to obtain custody of Alice." *Id.* at 40 (Brown, J., dissenting). The dissent further noted that the appellant's offer of proof had failed to show that Gonzales believed the criminal case would impact the CPS case against the appellant, much less

the CPS case against Jimenez. *Ibid.* Because the offer of proof did not establish a causal or logical connection between the CPS proceeding and any supposed bias Gonzales might have, the dissent believed that the appellant had failed to prove a violation of his right to confrontation. *Ibid.*

II. Why this holding is wrong

A. The First Court's ruling is based on speculation, and it provides precedent for other courts to reverse family violence convictions based on speculation about custody matters.

The most notable part of the record in this case is that defense counsel said he wanted to cross-examine Gonzales about "whether she gets the children" if CPS terminated the appellant's and Jimenez's parental rights, but, when he was given an unfettered opportunity to make an offer of proof, he failed to ask that question. When the trial court made its ruling, it had no clue whether Gonzales would get custody of Alice after the CPS proceedings; on discretionary review, this Court still doesn't know. Perhaps Gonzales is physically incapable of caring for a child full time; perhaps she has some criminal conviction that would discourage a family court judge from awarding her custody; perhaps, like many grandparents, she's fine being a temporary caregiver but would not want full legal custody; or perhaps she is now Alice's legal guardian and the two are happily living together.

Given the lack of evidence that Gonzales wanted custody of Alice or had taken steps to obtain custody of Alice, the First Court instead relied on sections of the Family Code showing that Gonzales *could* have been eligible for custody. *See Jones*, 540 S.W.3d at 28-29 (citing TEX. FAM. CODE §§ 153.004, 153.131, 153.432, 161.001, and 263.307). However, under the Family Code, once a court terminates parental rights, there is no presumption that the child should go to a grandparent. *See* TEX. FAM. CODE § 161.207 ("If the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult, the Department of Family and Protective Services, or a licensed child-placing agency as managing conservator of the child.").

Thus, while it is true that Gonzales *could* have obtained custody of Alice, it is also the case that any "suitable, competent adult" could have as well. Because its holding is unmoored from any factual basis showing that Gonzales wanted custody of Alice or had taken steps to obtain custody of Alice, the First Court's ruling in this case could be used as the basis for requiring baseless, prejudicial cross-examination of third-party witnesses in any family-violence case where the defendant and complainant are co-parents. *See Jones*, 540 S.W.3d at 29-30 (pointing out that parent's

conviction for violence against other parent removes statutory presumption in favor of parental custody, then speculating that "if" Jimenez's parental rights were also terminated, "appointment of a non-parent, like Gonzales, as sole managing conservator *could be* pursued.")(emphasis added).

B. Once the First Court's speculation is removed, nothing in the appellant's offer of proof shows a rational relationship between Gonzales's testimony and her supposed bias.

When a trial court excludes evidence, an appellate court should review that decision not based on speculation about what evidence could have been adduced, but based on the offer of proof made by the proponent. *See* TEX. R. EVID. 103(a)(2). "The primary purpose of an offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful." *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009).

This Court has repeatedly held that a party wishing to cross-examine a witness about bias must show not just the possibility of a bias, but a factual basis showing a logical connection between the potential bias and the testimony. *See Irby v. State*, 327 S.W.3d 138, 150 n.43 (Tex. Crim. App. 2010) (collecting "numerous Texas cases in which the cross-examiner failed to show a logical connection between the fact or condition that could give

rise to a potential bias or motive and the existence of any bias or motive to testify").

In this case, the appellant's offer of proof showed that there was an ongoing proceeding to terminate the appellant's and Jimenez's parental rights. It also showed that Gonzales wanted Alice to be safe.[2] What is missing is a logical connection between these facts that would suggest an actual bias, namely that Gonzales's desire to keep Alice safe had led her to involve herself in the custody case. Nothing in the record suggests that Gonzales stood to gain custody of Alice as a direct or indirect result of her testimony against the appellant, thus the appellant failed to show a factual basis for the bias he complained about on appeal.

This contrasts with the cases relied on by the First Court to show defendants have a right to cross-examine witnesses regarding bias stemming from custody disputes, *Fox v. State*, 115 S.W.3d 550 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) and *Ryan v. State*, 04-08-00594-CR, 2009 WL 2045211 (Tex. App.—San Antonio July 15, 2009, no pet.) (mem. op. not designated for publication). As Justice Brown's dissent in this case pointed out, both *Fox* and *Ryan* involved one parent testifying against another parent.

[2] While there is explicit testimony in this case that Gonzales wanted Alice to be safe, the State finds it unlikely that anyone wanted Alice to not be safe. The State does not believe a witness's testimony that she wants a toddler to be safe is sufficient to establish the witness wants legal custody of the toddler.

Given the statutory presumption that favors keeping children with parents, the witnesses in those cases would have been the default conservators if the defendants had their parental rights terminated.

Fox and *Ryan* would be on point in this case if the appellant had sought to cross-examine Jimenez about the child custody proceedings. But Jimenez did not testify. Instead, the appellant sought to cross-examine a non-parent about a child custody proceeding, but his offer of proof did not establish that the non-parent had any interest in the child custody proceeding.

Because the appellant's offer of proof failed to establish a logical connection between the potential bias and Gonzales's testimony, he failed to show that he was entitled to cross-examine Gonzales on this subject. The trial court was within its discretion to find this line of cross-examination irrelevant. The First Court erred in holding otherwise and this Court should reverse that holding.

Second Ground for Review

The First Court erred by failing to consider the weakness of the defensive evidence in conducting its harm analysis. The First Court looked only at the State's evidence, and ignored the fact that the appellant failed to produce evidence that would support a jury's finding that he acted in self-defense.

After determining that the trial court erred, the First Court conducted a harm analysis that looked solely at the State's evidence. *See Jones*, 540 S.W.3d at 33-35. In a motion for rehearing, the State urged the First Court to instead look at all the evidence in the case, including the appellant's testimony. Although the issue of self-defense was submitted to the jury, the appellant produced no evidence that would support a finding of self-defense. He never asserted that he struck Jimenez to prevent future harm; instead, he claimed that he had a right to retaliate. After the First Court requested (but did not receive) a response from the appellant, it denied the State's motion for rehearing without comment.

The State believes the First Court's harm analysis was deficient because it failed to take account of the appellant's failure to support his supposed defense. This Court should hold that in a case where a defendant confesses to the offense, an appellate court must consider the strength or non-existence of defensive evidence as part of its harm analysis.

I. Background

A. The only difference in relevant testimony was whether Jimenez "whacked," "tapped," or "karate kicked" the appellant's phone before the appellant slapped her.

Gonzales testified that the appellant was sitting in the garage playing on his phone when Jimenez approached him and, in an effort to get his attention, "whacked" or "tap[ped]" his phone. (4 RR 43, 76). Gonzales said that after this, the appellant slapped Jimenez, causing her to bleed, which was the assault for which he was charged and convicted. (4 RR 43-44).

The appellant testified that he was sitting in the garage playing on his phone and Jimenez "karate kicked" the phone out of his hand to get his attention. (4 RR 145-46). So he slapped her. (4 RR 146). The appellant did not testify that he was afraid of additional violence. He provided no testimony at all regarding his state of mind at the time of the slap.

B. The defensive theory throughout the trial was that the appellant had a right to violently retaliate after Jimenez kicked his phone.

Defense counsel never presented argument or evidence regarding the appellant's state of mind at the time of the slap. At every turn, the defense presented the slap as retaliation, not as preventing future violence. In voir dire, defense counsel advised the jury about possible defenses: "If it's mutual combat and the other person starts it, doesn't have to be an assault.… That's

not just technically self-defense, which it is, but it means something. As a male or female, you don't have to stand to be hit." (2 RR 124-25). In his opening statement, defense counsel previewed the evidence: "[Jimenez] kicked [the phone] out of his hands. And when she did that, there may have been a reaction to it as to a hit on the face." (4 RR 19).

At the charge conference, defense counsel's original request was not for a self-defense instruction, but instead for a "mutual combat paragraph." (4 RR 163). The trial court asked what that was, and defense counsel replied that "if two people are involved in mutual combat, then it's not an assault." (4 RR 163). The trial court questioned whether such a justification existed in the Penal Code, and defense counsel replied that it was case law: "It's basically saying that if two people intentionally and knowingly engage in mutual combat, then neither side can say assault…." (4 RR 163). The trial court then asked what language he wanted in the charge, and defense counsel replied, "It's basically that if you believe that two parties engage … into [a] mutually combative incident, then neither party can charge assault." (4 RR 163-64). After an off-the-record conversation, the trial court announced that, at the request of the defense, it was inserting a self-defense instruction in the charge. (4 RR 164).

In his jury argument, defense counsel argued that the right to self-defense was, in fact, a right to retaliate:

> It's called mutual combat. Also called self-defense.… You have a right to be in a place, somebody comes up to you and slaps you, you can slap them right back. You can use the exact force that was given to you. You can't use additional force. What that means is if somebody comes up to me because I'm in this courtroom I can't pull out a gun and shoot. … If somebody comes up to me and slaps me in this courtroom, I can slap them right back. Why? Because I don't want you to keep doing it and I don't have to retreat.

(4 RR 168).

Near the end of his argument, defense counsel told the jury it should acquit on the basis of mutual combat: "If I'm telling you what I heard from that witness stand and that's what you heard from the witness stand, if it is a boom-boom, I expect a not guilty on the last page of this charge. Because that's what — it's self-defense. It's mutual combat. It's consent to force." (4 RR 170).

C. The jury charge correctly instructed the jury that self-defense required a belief that slapping Jimenez was necessary to protect the appellant from bodily harm.

The self-defense instruction in this case is a simple statement of the law. (*See* CR 87-89). Self-defense is a forward-looking defense, requiring that the actor acts with the intent to prevent future harm: "[A] person is justified in using force against another when and to the degree he reasonably believes

the force is immediately necessary to protect himself against the other person's use or attempted use of unlawful force." TEX. PENAL CODE § 9.31(a); (CR 87). The charge went on to give an apparent-danger instruction, which advised that the point of self-defense is to protect oneself from a perceived attack. (CR 87-88). The application paragraph of the self-defense charge instructed the jury to acquit the defendant on the basis of self-defense if it believed, at the time of the assault,

> it reasonably appeared to the [appellant] that his person was in danger of bodily injury and there was created in his mind a reasonable expectation or fear of bodily injury from the use of unlawful force at the hands of [Jimenez], and that acting under such apprehension and reasonably believing that the use of force on his part was immediately necessary to protect himself against [Jimenez's] use or attempted use of unlawful force, the [appellant] struck [Jimenez] to defend himself ….

(CR 88).

II. Why the First Court's harm analysis was deficient

A. By looking only at the State's evidence in its harm analysis, the First Court failed to take into account "any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment."

A trial court's constitutional error does not require reversal if the reviewing Court determines, beyond a reasonable doubt, that the error did

not contribute to the conviction. TEX. R. APP. P. 44.2(a). In the context of a trial court's erroneous denial of the right of cross-examination, a harm analysis requires the reviewing court to assume that the damaging potential of the cross-examination was fully realized and then ask whether the error was harmless beyond a reasonable doubt. *Jones*, 540 S.W.3d at 33-34.

This Court has held that a harm analysis under Rule 44.2(a) should consider "any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment." *Snowden v. State*, 353 S.W.3d 815 (Tex. Crim. App. 2011). This is an analysis that will vary greatly from case to case; at the margins it may be more art than science. *See id.* at 822 n.31 (discussing various factors that may factor into harm analysis for violation of right to confrontation).

But in a case where a defendant takes the stand and admits to the charged offense, a harm analysis that fails to consider whether he actually provided evidence of a defense does not satisfy the *Snowden* standard. If a defendant confesses to the offense but fails to adduce evidence of a defense, the jury's verdict in such a case would be based solely on the defendant's confession. Why, then, would an appellate court have a reasonable doubt as to whether the denial of cross-examination of a State's witness contributed

to the verdict? *See Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000)(in conducting harm analysis for constitutional error, "the appellate court should calculate as much as possible the probable impact of the error on the jury in light of the existence of other evidence"). A defendant's failure to prove his defense is a variant on the "overwhelming evidence of guilt" that this Court has long considered an appropriate factor in analyzing whether an error was harmless beyond a reasonable doubt. *See Harris v. State*, 790 S.W.2d 568, 588 (Tex. Crim. App. 1989) (recognizing overwhelming evidence of guilt as factor in harm analysis under old Rule 81(b)(2)'s harmless-beyond-a-reasonable-doubt standard).

B. The appellant's evidence that he slapped Jimenez in retaliation for kicking his phone was not evidence of self-defense. The appellant's testimony was nothing more than a bare confession.

The appellant said nothing about his state of mind at the time he struck the complainant. (*See* 4 RR 145-47). Without evidence that the appellant feared additional violence and struck the complainant based on a belief that doing so was necessary to prevent additional violence, the appellant's testimony did not raise an inference of self-defense, even if Jimenez struck the appellant first. *See Ivy v. State*, No. 07-15-00023-CR, 2016 WL 6092524, at *3 (Tex. App.—Amarillo Oct. 17, 2016, no pet.)

(mem. op. not designated for publication) (where complainant struck defendant in fight over cell phone and defendant responded by shoving her to ground and stepping on her, evidence did not raise self-defense because there was no evidence of defendant's mental state; "The simple fact that the complainant may have struck appellant first provides no clue as to the state of mind of appellant at that point in time."); *Daisy v. State*, No. 05-01-01791-CR, 2002 WL 31528723, at *3 (Tex. App.—Dallas Nov. 15, 2002, no pet.) (mem. op. not designated for publication) (where complainant testified that she started fight and defendant struck her in retaliation, evidence did not raise self-defense because there was no evidence that defendant was defending against additional violence; evidence "raised an issue of retaliation, but not self-defense"); *Reynolds v. State*, No. 07-11-00500-CR, 2012 WL 6621317, at *4 (Tex. App.—Amarillo, Dec. 19, 2012, no pet.) (mem. op. not designated for publication) (where defendant testified that complainant kicked him, and then defendant struck complainant, evidence was insufficient to raise self- defense because defendant did not testify that he struck complainant out of fear of future violence; "Self-defense is not to be confused with retaliation."); *Garcia v. State*, No. 05-12-01693-CR, 2014 WL 1022348, at *7 (Tex. App.—Dallas, March 13, 2014, pet. ref'd) (mem. op. not designated for publication) (where complainant rushed defendant

and defendant shot him, and defendant, when asked whether he was afraid, testified "I don't like being pummeled," evidence did not raise self-defense because there was no evidence of defendant's mental state at time of shooting).

In the absence of direct evidence of a defendant's state of mind, self-defense can be raised if other evidence shows observable manifestations of the defendant's fear. *See e.g. VanBrackle v. State*, 179 S.W.3d 708, 713 (Tex. App.—Austin 2005, no pet.) (testimony that after complainant pointed gun at defendant, defendant pushed gun away and called for help sufficient to raise self-defense in absence of testimony by defendant). But the other witness to the offense, Gonzales, did not testify about any manifestations of fear on the appellant's part. (*See* 3 RR 42-44, 75-77).

The appellant's testimony explained why he committed assault. The fact that defense counsel asked the jury to acquit on the extra-legal basis that the complainant had it coming does not render the appellant's testimony sufficient to show self-defense. Under a correct harm analysis, the appellant's confession, coupled with his failure to adduce evidence of a valid defense, would render any error regarding the cross-examination of Gonzales harmless beyond a reasonable doubt.

Conclusion

The State asks this Court to reverse the First Court and reinstate the trial court's judgment.

KIM OGG
District Attorney
Harris County, Texas

/s/ C.A. Morgan
CLINT MORGAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Telephone: 713 496 2194
Texas Bar No. 24071454

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Adam Banks Brown
adambrownlaw@yahoo.com

Stacey Soule
information@spa.texas.gov

/s/ C.A. Morgan
CLINT MORGAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Telephone: 713 496 2194
Texas Bar No. 24071454

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